UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BOB CHAMBERS FORD, et al.,	***)***	
	)	
Plaintiffs	***)***	
	)	
v.	***)***	***Docket No. 98-140-B-C***
	)	
DEALER COMPUTER SERVICES, INC., et al.,	***)***	
	)	
	)	
Defendants	***)***	

MEMORANDUM DECISION ON PLAINTIFFS' MOTIONS TO REOPEN DISCOVERY AND TO STRIKE PORTIONS OF DEFENDANTS' REPLY MEMORANDUM AND RECOMMENDED DECISION ON MOTIONS BY ALL DEFENDANTS FOR JUDGMENT ON THE PLEADINGS ON COUNTS IV, VI AND VIII AND MOTION BY DEFENDANT UNIVERSAL COMPUTER SERVICES FOR JUDGMENT ON THE PLEADINGS ON ALL COUNTS

The defendants, Dealer Computer Services, Inc. ("DCS"), Ford Dealer Computer Services, Inc. ("FDCS"), and Universal Computer Services, Inc. ("UCS"), move for judgment on the pleadings on Counts IV, VI and VIII of the first amended complaint. Defendant UCS also moves for judgment on the pleadings on all counts asserted against it. The plaintiffs have moved for leave to conduct further discovery pursuant to Fed. R. Civ. P. 56(f) and to strike the defendants' Reply Memorandum in Support of Defendants' Motion for Judgment on the Pleadings ("Defendants' Reply") (Docket No. 19). I recommend that the court grant the motion of defendant FDCS as to Counts IV, VI and VIII, and grant the motion of defendant UCS as to Count I. I deny the motion to strike and find the motion to reopen discovery to be moot.

I. Applicable Legal Standard

A motion for judgment on the pleadings is governed by Fed. R. Civ. P. 12(c). The First Circuit has articulated the applicable standard for evaluating such a motion as follows:

> [B]ecause rendition of judgment in such an abrupt fashion represents an extremely early assessment of the merits of the case, the trial court must accept all of the nonmovant's well-pleaded factual averments as true and draw all reasonable inferences in [its] favor. . . . [T]he court may not grant a defendant's Rule 12(c) motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief."

Rivera-Gomez v. de Castro, 843 F.2d 631, 635 (1st Cir. 1988) (citations omitted). *See also Lovell v. One Bancorp*, 690 F. Supp. 1090, 1096 (D. Me. 1988) (on motion for judgment on pleadings, factual allegations in complaint must be taken as true and legal claims assessed in light most favorable to plaintiff; judgment warranted only if there are no genuine issues of material fact and moving party establishes that it is entitled to judgment as matter of law).

When a party seeking judgment on the pleadings submits materials in addition to the pleadings, it is within the court's discretion whether to consider those materials, thereby transforming the motion into one for summary judgment by operation of Fed. R. Civ. P. 12(c). *Snyder v. Talbot*, 836 F. Supp. 19, 21 n.3 (D. Me. 1993) (motion to dismiss under Rule 12(b)(6); language in rule concerning conversion to summary judgment identical); *see also Collier v. City of Chicopee*, 158 F.3d 601, 602-03 (1st Cir. 1998). The court may choose to ignore the supplementary materials and determine the motion under Rule 12. *Garita Hotel Ltd. Partnership v. Ponce Fed. Bank, F.S.B.*, 958 F.2d 15, 18-19 (1st Cir. 1992).

II. Factual Background

The first amended complaint (Docket No. 8) sets forth the following relevant allegations. The plaintiffs, Bob Chambers Ford and Bob Chambers Chevrolet (collectively, "Bob Chambers"), are Maine corporations that operate automobile dealerships in or near Augusta, Maine. First Amended Complaint ¶¶ 1-2, 9. Defendants DCS and FDCS are Delaware corporations with a principal place of business in Michigan. *Id*. ¶¶ 3-4. Defendant UCS is a Delaware corporation with a principal place of business in Texas. *Id.* ¶ 5.

Ford Motor Company developed a division known as the Dealer Computer Services Division to provide computer hardware and software systems to automobile dealerships. *Id*. ¶¶ 10-11. In or about 1992 Ford Motor Company sold this division to UCS, which organized the purchased division as a wholly-owned subsidiary, separately incorporated under the name Ford Dealer Computer Services, Inc. *Id*. ¶ 12. For at least a year after it was established, FDCS continued to use the Ford logo on its contracts and documents. *Id.* ¶ 13. On or about July 22, 1993 both Bob Chambers Ford and Bob Chambers Chevrolet entered into contracts with FDCS that included a 60-month term running from the date when the computer systems that were the subject of the contracts were operational, a date to be designated by FDCS. *Id*. ¶¶ 15-16, 23. Bob Chambers Ford has always made payments under this contract directly to Ford Motor Company, which includes the charges on a monthly statement that it issues to Bob Chambers Ford. *Id*. ¶ 17. The contracts are preprinted forms drafted by FDCS. *Id*. ¶ 21.

The contracts provide that, absent written notice of termination to FDCS 180 days prior to expiration of the original term, the contracts will be automatically renewed. *Id*. ¶ 22. In October 1997 both dealerships were notified by DCS, the successor to FDCS, that the operational date of the

systems was deemed to be September 7, 1993. *Id*. ¶¶ 29-30. DCS is also a wholly-owned subsidiary of UCS. *Id*. ¶ 29. In December 1997 the dealerships "verbally" informed representatives of DCS that they did not intend to renew the contracts. *Id*. ¶ 32. DCS and UCS were invited to submit bids, along with other potential vendors, for dealership computer systems for the plaintiffs. *Id*. The plaintiffs negotiated with "DCS/UCS" and other potential vendors. *Id*. ¶ 35. On or about April 24, 1998, the president of the plaintiffs notified UCS in writing that the contract would not be extended unless UCS submitted an acceptable competitive bid. *Id*. ¶ 36. On or about May 8, 1998 DCS informed the plaintiffs, in writing, that the contract had been automatically extended. *Id*. ¶ 38.

UCS continued to negotiate with the plaintiffs. *Id*. ¶¶ 40-44. On May 29, 1998 the plaintiffs received a fax from DCS's legal department threatening litigation to enforce the contracts. *Id*. ¶ 44. The DCS legal department has the same address, telephone number and fax number as UCS; the telephone number is answered "UCS." *Id*. ¶ 45. On June 9, 1998 the DCS legal department again threatened litigation against the plaintiffs, stating that signing a contract with any competitor would be a breach of the renewed contracts. *Id*. ¶ 48.

The first amended complaint includes nine counts. Count I seeks a declaratory judgment against all three defendants, to the effect that the contracts at issue expired on September 7, 1998, that DCS may not sue the plaintiffs under the terms of the contracts, and that UCS and DCS have waived any right to enforce Section 17 of the contracts. *Id*. ¶¶ 83-87. Count II alleges breach of contract against FDCS and DCS and also seeks a declaratory judgment that the computer systems that are the subject of the contracts became operational only after December 1, 1993. *Id*. ¶¶ 89-99. Count III alleges negligent representation against all three defendants. *Id*. ¶¶ 101-06. Count IV alleges fraudulent misrepresentation against all three defendants. *Id*. ¶¶ 108-13. Count V alleges

"innocent" misrepresentation against all three defendants. *Id*. ¶¶ 115-19. Count VI alleges silent fraud against all three defendants. *Id*. ¶¶ 121-27. Count VII alleges intentional interference with contract and prospective advantage by DCS and UCS. *Id*. ¶¶ 129-37. Count VIII alleges violation of 10 M.R.S.A. § 1171 *et seq*., the Maine Regulation of Business Practices Between Motor Vehicle Manufacturers, Distributors and Dealers Act, by all three defendants. *Id*. ¶ ¶ 139-42. Count IX alleges negligence by FDCS. *Id*. ¶¶ 144-48.

III. Discussion

A. Counts IV and VI

All three defendants seek judgment in their favor on Counts IV and VI of the first amended complaint on the grounds that these counts fail to plead fraud with the required particularity and that they fail to state a claim upon which relief may be granted. Fed. R. Civ. P. 9(b) applies to pleading fraud.

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

In the First Circuit, "Rule 9 requires specification of the time, place, and content of an alleged false representation, but not the circumstances or evidence from which fraudulent intent could be inferred." *McGinty v. Beranger Volkswagen, Inc.*, 633 F.2d 226, 228 (1st Cir. 1980). "[M]ere allegations of fraud, corruption or conspiracy, averments to conditions of mind, or referrals to plans and schemes are too conclusional to satisfy the particularity requirement." *Hayduk v. Lanna*, 775 F.2d 441, 444 (1st Cir. 1985) (citations omitted).

> Rule 9 imposes a heightened pleading requirement for allegations

> of fraud in order to give notice to defendants of the plaintiffs' claim, to protect defendants whose reputation may be harmed by meritless claims of fraud, to discourage "strike suits," and to prevent the filing of suits that simply hope to uncover relevant information during discovery.

Doyle v. Hasbro, Inc., 103 F.3d 186, 194 (1st Cir. 1996). "It is well settled that a pleading's allegation of fraud is sufficient if it identifies the circumstances constituting fraud so that the Defendant can prepare an adequate answer from the allegations." *Wyman v. Prime Discount Sec.*, 819 F. Supp. 79, 83 (D. Me. 1993). If the complaint involves multiple defendants, "each defendant's role must be particularized with respect to their alleged involvement in the fraud." *Rhone v. Energy North, Inc.*, 790 F. Supp. 353, 361 (D. Mass. 1991).

Here, the parties disagree initially on the question of the appropriate law to be applied, the defendants contending that it is Michigan law due to the provision found at section 18(C) of the contracts that "this agreement shall be governed by the laws of the State of Michigan," Contracts, Exhs. 1 & 2 to Defendants' Answer and Counterclaim (Docket No. 2), § 18(C) at 14, and the plaintiffs arguing that Maine law applies because the allegations of fraud, a tort, do not involve construction or application of the contract language, citing *Caton v. Leach Corp.*, 896 F.2d 939, 943 (5th Cir. 1990). Although it is unlikely that Michigan law would apply to the tort counts under the circumstances, as a practical matter the outcome of the motion for judgment on the pleadings will be the same whether Maine law or Michigan law applies. Accordingly, the court need not make a choice. *Fratus v. Republic W. Ins. Co.*, 147 F.3d 25, 28 (1st Cir. 1998).

In this case, the first amended complaint alleges the time, First Amended Complaint ¶¶ 30, 32, 37, 40-44; place, *id*. ¶¶ 30, 32-33, 41-43, 47; and content, *id*. ¶¶ 31, 35, 37, 41-44, 47, 51-52, 58, 63, 65, of the alleged fraudulent misrepresentations (Count IV) and silent fraud (Count VI). For both

claims, the content of the alleged fraud is essentially a failure to provide necessary information. To the extent that this type of fraud requires the existence of a duty to disclose the information, *see Fitzgerald v. Gamester*, 658 A.2d 1065, 1069 (Me. 1995) (fraudulent failure to disclose requires active concealment of truth or specific relationship imposing affirmation duty to disclose); *In re Rospatch Sec. Litig*, 760 F. Supp. 1239, 1262 (W.D.Mich. 1991) (in order for suppression of information to constitute fraud, there must be a legal or equitable duty of disclosure), such a duty is alleged. First Amended Complaint ¶¶ 55-56, 69, 101, 123. The first amended complaint also alleges facts showing why the alleged conduct was fraudulent. First Amended Complaint ¶¶ 31, 35, 37, 40, 42, 44, 47, 52, 60, 63, 66, 71, 121. Ordinarily, this would be sufficient under Maine law. *Wyman*, 819 F. Supp. at 82-83. It would also be sufficient under Michigan law. *Kopczynski v. Central States, Southeast & Southwest Areas Pension Fund*, 782 F. Supp. 350, 357 (E.D.Mich. 1992); *M&D, Inc. v. W.B. McConkey*, 585 N.W.2d 33, 36-40 (Mich. App. 1998).

However, the claims against FDCS in Counts IV and VI require separate treatment. The only factual allegations that mention FDCS are found in paragraphs 26, 55, 108 and 121-27 of the first amended complaint. The allegations in paragraphs 108 and 121-27 are too conclusory to meet the requirements of Rule 9(b). Paragraph 26 merely establishes that FDCS had notice that the computer systems it installed in 1993, and the training it provided, were unacceptable and inadequate. Paragraph 55 merely alleges that FDCS was "bound by a duty of good faith and fair dealing." The paragraphs alleging specific fraud resulting from these facts do not mention FDCS. Under these circumstances, defendant FDCS is entitled to judgment on the pleadings on Counts IV and VI.

The only close question presented by the first amended complaint is whether the roles of DCS and UCS in the alleged fraud are "particularized," as required under First Circuit precedent.

Many of the paragraphs of the first amended complaint that serve as the factual basis for Counts IV and VI allege the same conduct by DCS and UCS. However, several paragraphs identify only one of the two. *E.g.*, ¶¶ 30, 38, 63, 71 (DCS only); 33, 36-37, 40, 42-44, 47, 52 (UCS only). This appears to be sufficient particularization to allow these individual defendants to prepare an adequate answer to the first amended complaint, as they have done. Nothing further is required.

Defendants UCS and DCS are not entitled to judgment on the pleadings on Counts IV and VI.

B. Count VIII

This count alleges that the contracts at issue and the conduct of all three defendants violated 10 M.R.S.A. §§ 1174, 1177 and 1182. First Amended Complaint ¶ 142. In order for such violations to have occurred, the defendants must be "manufacturers" within the meaning of 10 M.R.S.A. § 1171(10). That statute provides:

> "Manufacturer" means a person, partnership, firm, association, corporation or trust, resident or nonresident, who manufactures or assembles new motor vehicles or imports for distribution through distributors of motor vehicles or any partnership, firm, association, joint venture, corporation or trust, resident or nonresident, that is controlled by the manufacturer. The term "manufacturer" includes the terms "franchisor," "distributor," "distributor branch," "factory branch" and "factory representative."

The defendants contend that the first amended complaint "does not allege that Ford owns the stock or assets of either UCS or DCS or that it otherwise holds legal control through ownership over either UCS or DCS," so that it is clear on the face of the first amended complaint that the defendants are not automobile manufacturers within the statutory definition. Defendants' Motion for Judgment on the Pleadings ("Motion for Judgment") (Docket No. 15) at 10. They also argue that the agency relationship between Ford and DCS described at section 18(F) of the contracts cannot make DCS

a manufacturer, because it does not demonstrate that Ford has legal control over DCS. *Id*. at 10-11.

The plaintiffs respond that the question whether any of the defendants is controlled by Ford is a factual question that cannot be resolved on a motion for judgment on the pleadings[1] and that the first amended complaint contains sufficient allegations of control over UCS and DCS by Ford.[2] I agree. First Amended Complaint ¶¶ 18-19, 55, 139-40. Nothing further is required at the pleading stage of this action. The statutory definition does not specify the means by which the party at issue must be controlled by an automobile manufacturer. The argument presented by both sides on this count is more appropriate for consideration in connection with a motion for summary judgment than it is for a motion for judgment on the pleadings.

UCS and DCS are not entitled to judgment on the pleadings on Count VIII.

C. Other Counts (UCS Only)

I have already determined that defendant UCS is not entitled to judgment on the pleadings as to Counts IV, VI and VIII of the first amended complaint. Remaining for determination pursuant to UCS's motion for judgment on the pleadings as to all counts asserted against it are Counts I, III, V, and VII. UCS contends that it is entitled to judgment on the pleadings because all of these counts

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[1] The defendants have attached to their motion as Exhibit A an affidavit of Robert M. Nalley, which asserts, *inter alia*, that DCS is neither a parent nor a subsidiary of UCS and that Ford Motor Company does not own, manage or control either DCS or UCS. In their reply memorandum, they assert that the facts included in this affidavit "are not necessary to" their motion, nor do they rely on the affidavit in pressing their motion. Reply Memorandum in Support of Defendants' Motion for Judgment on the Pleadings (Docket No. 19) at 1. If I were to rely on the affidavit, the pending motion for judgment on the pleadings would be converted into one for summary judgment. I decline to consider the affidavit. *Garita Hotel*, 958 F.2d at 18-19. Accordingly, the plaintiffs' Motion for Reopening of Discovery and An Order to Compel Compliance with Discovery Responsibilities by Defendants Pursuant to Rule 56(f) (Docket No. 18-2) is moot and will not be addressed further.

[2] The plaintiffs present no argument on this point concerning defendant FDCS. Accordingly, judgment on Count VIII should be entered in favor of FDCS.

arise out of the contracts at issue, to which it was not a party, and because the first amended complaint fails to allege a factual basis for any of these claims against it. The first argument oversimplifies the first amended complaint. The second argument is incorrect, at least as to some of the claims.

1. Count I. Count I of the first amended complaint seeks a declaratory judgment. The following relief is requested against UCS:

> a declaratory judgment against UCS . . . declaring that . . . the Contracts forbid . . . UCS from commencing litigation against the Dealerships with respect to . . . termination [of the contracts], or with respect to the Contracts in any manner, and UCS has no basis, contractual or otherwise, to commence litigation against the Dealerships and that the Court award costs, interest and such other and further relief as it may deem just, including injunctive relief enjoining . . . UCS from, *inter alia*, commencing any such litigation.

First Amended Complaint at 14. UCS is not a party to the contracts. *Id*. ¶ 86; Exhs. A & B. Nor does any contract language otherwise provide a basis for a declaration that UCS is barred from commencing litigation against the plaintiffs.

The request for a declaration that UCS has no basis whatsoever to commence any litigation against the plaintiffs far exceeds the scope of the factual allegations in the first amended complaint. Similarly, there is no basis in the first amended complaint, even drawing all reasonable inferences in favor of the plaintiffs, for injunctive relief preventing UCS from bringing any legal action against the plaintiffs. UCS is entitled to judgment on the pleadings on Count I.

2. Count III. Count III of the first amended complaint alleges negligent misrepresentation. UCS does not discuss this count separately in its motion for judgment on the pleadings and the supporting memoranda of law. However, the allegations in the first amended complaint sufficiently set forth

the elements of this tort claim under both Maine and Michigan law. *Perry v. H. O. Perry & Son Co*., 711 A.2d 1303, 1305 (Me. 1998); *Law Offices of Lawrence J. Stockler, P.C. v. Rose,* 436 N.W.2d 70, 81 (Mich. App. 1989). As a result, UCS is not entitled to judgment on the pleadings on Count III.

3. Count V. Count V of the first amended complaint alleges innocent misrepresentation. Again, UCS does not discuss this count separately in its submissions. The Maine Law Court has not yet explicitly recognized this tort, although it has referred with approval to the section of the Restatement (Second) of Torts that defines innocent misrepresentation. *Emerson v. Ham,* 411 A.2d 687, 690 (Me. 1980). That section of the Restatement provides:

> One who, in a sale, rental or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act or to refrain from acting in reliance upon it, is subject to liability to the other for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently.

Restatement (Second) of Torts, § 552C(1) (1977). The allegations of the first amended complaint sufficiently plead the elements of this tort against UCS.

The question is closer if Michigan law applies. In Michigan,

> [a] claim of innocent misrepresentation is shown if a party detrimentally relies upon a false representation in such a manner that the injury suffered by that part inures to the benefit of the party who made the representation. The innocent misrepresentation rule represents a species of fraudulent misrepresentation but has, as its distinguished characteristics, the elimination of the need to prove a fraudulent purpose or an intent on the part of the defendant that the misrepresentation be acted upon by the plaintiff, and has, as added elements, the necessity that it be shown that an unintendedly false representation was made in connection with the making of a contract and that the injury suffered as a consequence of the misrepresentation inure to the benefit of the party making the misrepresentation. Thus, the party alleging innocent misrepresentation is not required to prove that the party making the misrepresentation intended

> to deceive or that the other party knew the representation was false. Finally, in order to prevail on an innocent misrepresentation claim, a plaintiff must also show that the plaintiff and defendant were in privity of contract.

M&D, Inc., 585 N.W.2d at 37 (citations omitted). While the first amended complaint does allege that UCS and the plaintiffs were in privity of contract, First Amended Complaint ¶ 115, that assertion is called into question by the allegations that no contract existed between UCS and the plaintiffs, *id*. ¶¶ 86, 129. Nevertheless, the First Circuit requires a "generous" reading of the allegations in a complaint when a motion for judgment on the pleadings is under consideration, *Collier*, 158 F.3d at 602, and I accordingly conclude that, whether Maine or Michigan law applies to this tort claim, UCS is not entitled to judgment on the pleadings on Count V.

4. Count VII. Count VII of the first amended complaint alleges that UCS intentionally interfered with the plaintiffs' contracts with a competitor and with a prospective business advantage. UCS argues that there are no factual allegations to support such a charge against it, both because the threats alleged were threats to sue the plaintiffs, which only DCS could have done, and because the first amended complaint alleges only attempted interference, while the tort requires as one of its elements that the interference be successful. Motion for Judgment at 5; Defendants' Reply[3] at 4-5. Curiously, both sides refer only to Maine law in their submissions on this issue. Plaintiffs'

[3] The plaintiffs have filed a Motion to Strike Portions of Defendants' Reply Memorandum in the Context of the Defendants' Motion for Judgment on the Pleadings or in the Alternative to Permit the Filing of a Sur-Reply Memorandum ("Motion to Strike") (Docket No. 22), in which they contend that the reply memorandum raises a number of substantive arguments for the first time, in violation of this court's Local Rule 7(c). They argue that these portions of the reply memorandum should be stricken, or, in the alternative, that they should be allowed to file a surreply memorandum, a copy of which is attached to the motion, addressing the new arguments. To the extent that I have relied on the defendants' reply memorandum, I have not relied on the portions identified by the plaintiffs as raising new substantive argument. Motion to Strike at 1-2. I have not considered the surreply memorandum. Therefore, I deny the motion to strike.

Memorandum in Opposition to Defendants' Motion to Dismiss Pursuant to Rules 12(c) and 9(b) (Docket No. 18-1) at 9; Reply Memorandum at 4.

The first amended complaint alleges a sufficient relationship between UCS and DCS to allow the reasonable inference that it could carry out its alleged threats to have DCS sue the plaintiffs. The threats in any event are alleged only as evidence of intimidation; the first amended complaint also alleges that UCS engaged in fraud, an alternate element of the cause of action under Maine law. *Northeast Coating Tech., Inc. v. Vacuum Metallurgical Co.*, 684 A.2d 1322, 1325 (Me. 1996). The Maine Law Court has specifically declined to decide whether an existing relationship is required as an element of this tort, *James v. MacDonald*, 712 A.2d 1054, 1057 (Me. 1998), but in any event the first amended complaint alleges an existing relationship with the competitor, First Amended Complaint ¶¶ 77-78.

Michigan law does not require an existing relationship as an element of the tort of interference with an advantageous business relationship. *Bonelli v. Volkswagen of Am., Inc.*, 421 N.W.2d 213, 219-20 (Mich. App. 1988). Otherwise, the elements are essentially the same as those under Maine law: the existence of a business relation or expectancy, knowledge of the relation or expectancy on the part of the interferer, intentional interference causing a breach or termination of the relation or expectancy and resulting damage. *Id*. at 219; *Northeast Coating*, 684 A.2d at 1325. The first amended complaint, read as *Collier* requires, sufficiently alleges these elements.

IV. Conclusion

For the foregoing reasons, I recommend that the defendants' motions for judgment on the pleadings be **GRANTED** as to defendant Ford Dealer Computer Services, Inc. on Counts IV, VI and

VIII; and as to defendant Universal Computer Services, Inc. on Count I; and otherwise **DENIED**. I further find that the plaintiffs' motion for reopening of discovery is **MOOT**. The plaintiffs' motion to strike portions of the defendants' reply memorandum or, in the alternative, for leave to file a surreply memorandum, is **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 12th day of February, 1999.

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David M. Cohen
United States Magistrate Judge